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No. 80-615

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAM BESASE, SAM RAPPAPORT AND TED MAISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the judgment of the court of appeals upholding wagering tax assessments and penalties against them in the amount of $1,047,553.78.

The pertinent facts may be summarized as follows: On October 23, 1963, after several days of surveillance, agents of the Internal Revenue Service, pursuant to a search warrant, conducted a raid on an apartment at 2301 West Alexis Road, Toledo, Ohio. During the raid, they found a concealed room that contained stacks of betting (numbers) slips and other gambling paraphernalia. They also found petitioners Besase and Rappaport there, and numbers slips that were identified as having been written by a third person and delivered to petitioner Maison, who

had been observed on the premises prior to the raid (Pet. App. A7-A10). Based upon the records seized during this raid, the Internal Revenue Service issued assessments for wagering taxes, plus penalties and interest against each petitioner and four other individuals believed to be connected with the Alexis Road gambling operations[1] (Pet. App. A3, A11).

Subsequently, the government brought this action in the United States District Court for the Northern District of Ohio to reduce these assessments to judgments. At trial, petitioners (and the four other individuals) denied any involvement in the numbers operation.[2] They explained that their presence in the apartment was purely for social purposes (Pet. App. A8).

The district court held that petitioners and the other individuals against whom assessments were made "have carried their burden of refuting by a preponderance of the credible evidence the presumption of correctness attached to * * * [the] assessments" (Pet. App. A36). The court also found that the government "has failed to refute the credible testimony of" petitioners and others (*ibid.*) and therefore judgment was entered against the government (Pet. App. A38).

The court of appeals reversed as to petitioners. As it stated, "Sam Besase was found in the countroom at the time of the raid" (Pet. App. A9). Moreover, the countroom telephone was still in his name, and he was

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[1] The assessments were based on the theory that all seven individuals were associated with the Alexis Road operation, which was assumed to be either a partnership or some other type of joint venture.

[2] Petitioners admit that during the pertinent period they were engaged in wagering. They maintained, however, that their wagering operations were separate from the Alexis Road operation.

identified as someone who would receive numbers slips and speak on the telephone to transact countroom business (*ibid.*). Likewise, IRS agents observed Ted Maison entering and leaving the building, and numbers slips were identified as having been written for him (Pet. App. A10). Similar evidence linked Sam Rappaport to the gambling enterprise (*ibid.*). In these circumstances, the court of appeals correctly found that "the evidence clearly ties [all three petitioners] to the * * * [Alexis Road] operation"[3] (Pet. App. A9).

1. Petitioners contend (Pet. 12) that because the government's original theory in assessing the tax liability was predicated upon the existence of a six or seven member partnership and the government failed to establish the existence of such a partnership, the assessments cannot be sustained. However, the court of appeals found that the government had established that petitioners were operating the lottery. This is sufficient to establish petitioners' liabilities for the unpaid excise taxes as members in a partnership or joint venture. Whether such an enterprise was conducted by three or six persons was immaterial because the liability of partners for the unpaid obligations of such an operation is joint and several. Nothing in the opinion of the court of appeals reflects a finding that the three petitioners were conducting separate gambling businesses, as individuals, at the Alexis Road address. To the contrary, the court of appeals analyzed the evidence with respect to each petitioner (Pet. App. A9-A10) and concluded that it tied each of them to the "countroom operation" and established them as members of a common enterprise conducted in the Alexis Road "countroom."

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[3] The court of appeals affirmed the judgment in favor of the four other individuals (Pet. App. A10).

2. Petitioners also argue (Pet. 10-11) that the record does not support the court of appeals' ruling that they were involved in the Alexis Road operation. But as we have pointed out (*supra*, pages 2-3), the court of appeals carefully analyzed the evidence and was amply justified in concluding otherwise. This fact-bound determination does not warrant review by this Court.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

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[4]Petitioners explained that their presence at the Alexis Road premises, either prior to or during the raid, was for social purposes. However, petitioners failed to explain other evidence that, as the court of appeals noted (Pet. App. A9), "clearly ties them to the countroom [Alexis Road] operation." As the court pointed out (Pet. App. A9-A10), seized numbers slips were identified as being written for petitioners. Petitioners contend (Pet. 11) that the court of appeals erred in stating that some of the seized slips had been written and turned in to petitioner Maison by Mary Bilecki. There is no dispute, however, that Bilecki wrote numbers for both Maison and Rappaport, who were admittedly partners (Pet. App. A19), and that she identified some of the seized slips as being written by her. While she testified that the seized slips were delivered to a person called "Bob," she could not identify "Bob" and no one present at the time of the raid had that name. Moreover, there was other evidence that connected petitioners to the Alexis Road operation (Pet. App. A23-A29). Although petitioners' testimony could be viewed as providing some minimal support for the result reached by the district court, the court of appeals was amply justified in reaching the opposite conclusion. "[T]he reviewing court on the entire evidence * * * [was] left with the definite and firm conviction that a mistake has been committed." Compare *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948).